No. 03-1454

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

ANGEL MCCLARY RAICH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The Ninth Circuit has held that Congress lacks the power under the Commerce Clause to proscribe the intrastate possession, manufacture, and free distribution of marijuana for purported medicinal use. That holding is unprecedented, conflicts with the decisions of numerous other courts of appeals, and partially invalidates the Controlled Substances Act (CSA), an Act of Congress that is central to combating illegal drug possession, manufacture, and distribution throughout the country. The decision clearly warrants this Court's review.

A. The Court of Appeals' Decision Significantly Undermines The Government's Enforcement of The CSA

1. The court of appeals' decision merits this Court's review because it partially invalidates an Act of Congress on constitutional grounds and "the decision raises significant questions as to the ability of the United States to enforce the Nation's drug laws." *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489 (2001). The legal and practical impact on the Ninth Circuit's decision is extraordinary. Since the filing of the government's petition, not only has the significant litigation set forth in the petition continued

unabated (Pet. 22- 24), but the court of appeals' decision has spawned new impediments to the federal government's ability to enforce the CSA. For instance, on April 21, 2004, a district court held that, in light of *Raich*, a cooperative of 250 members was entitled to a preliminary injunction that bars the federal government from enforcing the CSA against the cooperative's marijuana manufacturing and distribution operations. *Country of Santa Cruz* v. *Ashcroft*, No. C 03-01802 JF, 2004 WL 868197 (N.D Cal.). The court reached that result despite the cooperative's distribution of marijuana to many persons and its collection of financial contributions from its members and others to support its operations. The court found its holding compelled by the Ninth Circuit's decision in this case "[a]bsent intervention by the Supreme Court." 2004 WL 868197, at *7.

Similarly, the Ninth Circuit recently relied on *Raich* to order the release from prison of an individual who is currently appealing two marijuana convictions arising out of his manufacture of more than 1500 marijuana plants for purported medicinal use. The Ninth Circuit found that bail pending the defendant's appeal was warranted because its decision in *Raich* "changed the legal landscape on the issue of the permissible reach of the Controlled Substances Act in circumstances where it is asserted that the drug involved is marijuana, the use is for medicinal purposes, and the use is strictly local." *United States* v. *Alden*, No. 02-10673 & 10674, at 2 (Mar. 30, 2004). Moreover, the magistrate judge who imposed the conditions of bail release also declined to order otherwise mandatory drug testing of the defendant, explaining that, after the decision below, courts must "tread very lightly" on marijuana activities for purported medical use. *Marijuana Convict Won't Face Drug Testing*, Tri-Valley Herald, Apr. 27, 2004, at 6.

In short, the Ninth Circuit's decision not only held the CSA unconstitutional as applied to individuals such as respondents who allege that they locally use, manufacture, and distribute marijuana, but the decision also has prevented

the government from applying the CSA to entities and individuals engaged in widespread marijuana manufacturing and distribution.[1]

The Ninth Circuit's partial invalidation of the CSA also threatens a substantial increase in the level of prohibited drug activity in States within the Ninth Circuit. Respondents rely on the fact that only a small percentage of the population in those States reportedly use marijuana for asserted medical purposes. Br. in Opp. 16-17. Those static figures, however, do not account for the dynamic effect of the decision below. Respondents' figures represent only individuals who admit they engaged in marijuana-related activity despite a blanket *federal* prohibition against any such activity (outside the narrow scope of use authorized by the CSA). The Ninth Circuit's decision has now removed that federal prohibition.

2. In opposing certiorari, respondents concede that the decision below "presents questions of great importance" but they argue that this Court's review should be deferred because the decision is interlocutory (Br. in Opp. 11) and because respondents would be entitled to a preliminary injunction on alternative grounds (*id.* at 12). Neither of those contentions justifies leaving the constitutional validity of the CSA in doubt pending further proceedings.

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[1] Respondents erroneously argue that John Does One and Two "cultivate" marijuana without engaging in "distribution" when they thereafter provide Raich with the drug. Pet. 7 n.7. The CSA defines the term "distribution" to include "the actual, constructive, or attempted transfer" of marijuana. 21 U.S.C. 802(8) and (11). The record shows that "John Does Number One and Two * * * are caregivers who *distribute* marijuana." Pet. App. 64a n.10 (emphasis added); accord *id.* at 5a ("These caregivers *provide* Raich with marijuana free of charge."); Br. in Opp. App. 37a (Declaration of Raich) ("they grow my medicine and "*give* it to me free of charge.") (emphasis added).

a. ***A remand for further proceedings is unnecessary***

The petition presents the purely legal question whether Congress has the power under the Commerce Clause to regulate the wholly intrastate possession, manufacture, and distribution without charge of marijuana for asserted medical use. No further factual development or proceedings are needed for this Court to resolve that legal issue. Pet. 21, 24. Indeed, after the filing of the government's petition in this case, the district court on remand entered a preliminary injunction enjoining the Attorney General and the Administrator of DEA "from arresting or prosecuting Plaintiffs Angel McClary Raich and Dianne Monson, seizing their medical cannabis, forfeiting their property, or seeking civil or administrative sanctions against them with respect to the intrastate, noncommercial cultivation, possession, use, and obtaining without charge of cannabis for personal medicinal purposes on the advice of a physician and in accordance with state law, and which is not used for distribution, sale, or exchange." Preliminary Injunction Order, *Angel McClary Raich* v. *John Ashcroft*, No. C 02 4872 MJJ (N.D. Cal. May 14, 2004), at 1- 2.[2]

There also is no basis for deferring this Court's review pending further proceedings to determine whether the activities of individuals who are similarly-situated to respondents substantially affect commerce. Br. in Opp. 11-12. The relevant class of activities is the CSA's *comprehensive* regulation of the interstate possession, manufacture, and distribution of controlled substances generally, which indisputably takes place in interstate commerce and substantially affects interstate commerce. Pet. 10-20. Whether Congress constitutionally found it necessary and proper to regulate respon-

[2] Respondents suggest that proceedings on remand might shed light on whether the case is ripe or they have standing. That is not correct. Respondents have standing and the case is ripe because respondents are admittedly engaged in flagrant violations of the CSA, and the DEA already has taken enforcement action against respondent Monson by seizing her six marijuana plants.

dents' activities in order to effectuate its comprehensive and closed scheme of interstate drug regulation is purely a legal question that does not turn on a district court's findings of fact. *E.g.*, *Sabri* v. *United States*, 124 S. Ct. 1941, 1946-1947 (2004). As this Court recently explained, "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control,'" and "[o]nly that general practice need bear on interstate commerce in a substantial way." *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003) (per curiam) (quoting *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

Moreover, even if the relevant class of activities were confined to respondents' conduct, it would not matter. Congress has already made the factual determination that wholly intrastate drug use, production, and distribution in the aggregate substantially affects the interstate drug market. 21 U.S.C. 801; see Pet. 3-5, 12-15. Congress's findings apply with equal force to all schedule I drugs, including marijuana, and without regard to whether the purported use is medicinal or otherwise. Indeed, the CSA lists marijuana as a schedule I drug precisely because it has no currently accepted medical use, 21 U.S.C. 812(b)(1)(A)-(C), and the CSA accordingly bans all possession, manufacture, and distribution of marijuana outside the confines of the CSA even for an asserted medical necessity. *Oakland Cannabis*, 532 U.S. at 491, 494 n.7; Pet. 2-3, 16-18.[3]

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[3] Respondents fault the government for describing their activities as involving the "purported" "medicinal" use of marijuana. Br. in Opp. 5 n.5. That description accurately reflects Congress's definitive judgment that marijuana has no recognized medical use. Moreover, the Institute of Medicine (IOM) report relied upon by respondents (*id.* at 3) is not a "study." Rather the IOM reviewed the existing scientific evidence concerning possible medical uses of marijuana and recommended that further research be devoted, not to developing marijuana as a licensed drug, but to developing a method of delivering cannabinoids without the serious

b. *Respondents' alternative contentions lack merit*

Respondents also contend that they would remain entitled to a preliminary injunction even if the Court reversed the Ninth Circuit. In particular, they argue that their activities are protected by the doctrine of medical necessity (Br. in Opp. 25- 27) and the Fifth and Tenth Amendments (*id.* at. 23, 27-30). The district court correctly rejected each of those contentions, however, Pet. App. 58a-65a, and the court of appeals did not review those aspects of the district court's decision. *Id.* at 9a. Moreover, respondents cite to no decision adopting any of their contentions. Accordingly, were the Court to grant certiorari and reverse the Ninth Circuit's Commerce Clause holding, the appropriate course would be to remand the matter to the Ninth Circuit for it to consider respondents' other contentions in the first instance. See, *e.g.*, *Oakland Cannabis*, 532 U.S. at 495 n.7 (declining to reach respondents' contention that the CSA as applied to them violated the Commerce Clause). Thus, a reversal by this Court would remove the basis for the district court's preliminary injunction.

Respondents' other arguments fare no better than their Commerce Clause argument. First, as noted by respondents (Br. in Opp. 27 n.19), this Court in *Oakland Cannabis* has already rejected the distinction between a claimed medical necessity to manufacture and distribute marijuana and a claimed medical necessity to posses it. 532 U.S. at 494 n.7. Moreover, this case involves the manufacture and distribution of marijuana, as well as possession. Second, if this Court

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adverse health consequences associated with smoking marijuana. See IOM, *Marijuana and Medicine: Assessing the Science Base* 10-11 (Janet E. Joy, Stanley J. Watson, Jr. & John A. Benson, Jr. eds., 1999) ("Because marijuana is a crude THC delivery system that also delivers harmful substances, smoked marijuana should generally not be recommended for medical use."). Similarly, although respondents point out that Marinol is a lawful drug that contains THC (Br. in Opp. 3 n.3), respondents do not (and could not) dispute that *marijuana* is a schedule 1 controlled drug that has never been approved for any medical use by the FDA. Pet. 17 n.4.

rejects respondents' Commerce Clause argument, that holding would doom respondents' Tenth Amendment argument. In cases that do not involve specific circumstances such as the federal commandeering of state governments or officials, the Tenth Amendment "states but a truism that all is retained which has not been surrendered," *United States* v. *Darby*, 312 U.S. 100, 124 (1941), and "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U.S. 144, 156 (1992).

Finally, the CSA does not violate respondents' asserted fundamental right to use marijuana for purported medical purposes despite Congress's judgment that it is dangerous to public health and safety and has no currently accepted medical use. Pet. App. 61a-63a. There is no such fundamental right, and in any event, Congress has established procedures to remove marijuana from schedule I if the drug no longer satisfies the criteria for that schedule (21 U.S.C. 811), and has provided the Food and Drug Administration (FDA) with authority to approve marijuana should it be shown to have a medical use (21 U.S.C. 355). Congress also permits individuals to participate in research projects that have been registered with the DEA and approved by the FDA. 21 U.S.C. 355(i), 823(f). Significantly, respondents do not assert that they have invoked any of those statutory mechanisms.

B. The Ninth Circuit Erroneously Concluded That Congress Lacked The Power to Regulate The Manufacture, Possession, And Free Distribution of Marijuana

1. In defending the Ninth Circuit's decision on the merits, respondents attempt to distinguish *Wickard* v. *Filburn*, 317 U.S. 111 (1942), on the theories that *Wickard* involved a commercial farm that produced wheat; the statute at issue in *Wickard* exempted the production of small quantities of wheat; and the production of wheat in *Wickard* had a

more substantial effect on interstate commerce than the medicinal use of marijuana. Br. in Opp. 14-17. Those contentions fundamentally miss the import of *Wickard*'s aggregation principle. In *Wickard*, the Court held that Congress had authority under the Commerce Clause to regulate the production of home-grown wheat, even though the wheat was not "sold or intended to be sold," 317 U.S. at 119; the production "may not be regarded as commerce," *id.* at 125, and the regulated individual's own activity "may be trivial by itself," *id.* at 127. The Court reached that result because regulation of the local activity was necessary to achieve Congress's broader regulation of the interstate wheat market, an area indisputably within Congress's power. *Id.* at 127-129. As this Court later explained, *Wickard* stands for the proposition that Congress's regulation of wholly intrastate and non-commercial activity may be sustained as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *United States* v. *Lopez*, 514 U.S. 549, 561 (1995).

Despite that principle, the court of appeals found the relevant class of activities to be narrowly confined to respondent's activities and then determined that Congress had not sufficiently found that the wholly intrastate use of marijuana for asserted medical purposes substantially affects commerce. Pet. App. 9a-23a. Respondents simply reiterate the same mistaken reasoning. Br. in Opp. 17-21. That reasoning ignores the comprehensive nature of the CSA and the need to regulate all drug activity to achieve the CSA's purpose of establishing a nationwide and closed system of drug distribution, as well as Congress's specific findings that intrastate drug activity *does* substantially affect interstate commerce.

2. For those reasons, respondents err in asserting that the Ninth Circuit's decision does not conflict with the decisions of other courts of appeals that have rejected Commerce Clause challenges to the CSA as applied to the local manu-

facture and simple possession of marijuana. Br. in Opp. 13. In contrast to the Ninth Circuit, the Second, Fourth, and Eighth Circuits have held that the relevant class of activity is the general class of activity regulated under the CSA *as a whole*. Pet. 18-20.

Respondents' attempt to isolate their asserted *medical* use of marijuana as the relevant class of regulated activity (Br. in Opp. 13) is misplaced. For purposes of Congress's power under the Commerce Clause, the asserted *use* of a drug—medical or otherwise—is irrelevant. Congress regulates marijuana as a *substance*, regardless of its asserted use, and respondents' judgment that Congress's purposes in passing the CSA apply with less force when the substance's use is asserted to have a medical utility is simply a policy disagreement with Congress's decision to address the problems posed by marijuana and other schedule I substances though a broad prohibition. Pet. 16-18.

Regardless of the motive for drug use, Congress was entitled to conclude that the intrastate regulation of marijuana—a drug that is regularly bought and sold in a defined, substantial, and well-established interstate and commercial market—is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. Congress reasonably determined that it was necessary and proper to guard against the significant risk that the local use, manufacture, and free distribution of marijuana would increase the interstate supply and marketing of marijuana; that local users would ultimately purchase marijuana in the black market to fill their asserted medical needs (for instance, should their production efforts fail or fall short) or, conversely, that local users would ultimately sell or divert the drug (for instance, should their production exceed their purported need); and that there would be difficult questions of proof in determining whether any given quantity of processed marijuana resulted from a commercial or interstate exchange. 21 U.S.C. 801; Pet. 11-14.

The absence of congressional authority to regulate the intrastate use, manufacture, and free distribution of marijuana would fundamentally undercut the congressional scheme. Individuals such as respondents who produce, consume, and distribute marijuana would be exempt from federal regulation. Although respondents counter that state law provides some regulation (Br. in Opp. 23-24), state law does not purport to establish anything like the comprehensive statutory and regulatory controls established by the CSA. 21 U.S.C. 821-829; 21 C.F.R. Pts. 1301-1306; Pet. 15.

More fundamentally, respondents ignore Congress's judgment that the best way to regulate the manufacture and distribution of marijuana—a power Congress clearly possess and numerous cases have recognized—is to ban all use, manufacture, and distribution except within the narrow confines of the Act. The regime permitted by the Ninth Circuit's decision ignores that judgment and would let a *schedule I* controlled substance be consumed, manufactured, and distributed. Pet. 14-17. Because Congress rationally and permissibly determined that such activity was integrally related to the economic and interstate activity of drug trafficking, the Ninth Circuit's partial striking of an Act of Congress as unconstitutional warrants this Court's review.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2004